

Insurance Law: Constitutionality of No-Fault in Massachusetts

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views on this issue. In effect, the court has taken pains to limit the operation of the statute by establishing these evidentiary limitations.

FRANK THOMAS CRIVELLO

Insurance Law: Constitutionality of No-Fault in Massachusetts—For the past several years, everyone involved in negligence law has had to confront the question of reform in the traditional automobile accident reparations system. There is widespread agreement that some reform is needed, but at present a great deal of energy is being expended over whether any of the proposed “no-fault” systems of auto insurance is a proper means to reform.

First presented in the Columbia Plan,¹ no-fault was given its recent impetus by the work of Professors Robert Keeton and Jeffrey O’Connell,² who laid a network of criticism at the feet of the traditional tort-recovery system:

It pays too little, too late, unfairly distributed and at wasteful cost, and through procedures that promote dishonesty and disrespect for the law. These are the symptoms of a fatally ill system. It cannot survive.³

The general theme of the Keeton-O’Connell Basic Protection Plan is that an injured person is automatically reimbursed for his economic loss—medical expenses and wage loss—regardless of who is at fault. In return, the insured surrenders his right to bring a traditional tort action, and consequently surrenders his right, in most cases, to recover general damages (pain, suffering, enjoyment of life, etc.). Variations on this theme have proliferated, differing in the type of benefits offered, the maximum amounts available, and the conditions under which tort recovery for general damages would be allowed.⁴

1. COLUMBIA UNIVERSITY COUNCIL FOR RESEARCH IN THE SOCIAL SCIENCES, REPORT BY THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932).

2. Professors of Law at Harvard University and Illinois University respectively, and authors of BASIC PROTECTION FOR THE TRAFFIC VICTIM (1965).

3. Keeton, *Basic Protection—An Answer to the Automobile Insurance Crisis*, 1 CONN. L. REV. 13, 16 (1968).

4. At present, some form of no-fault insurance system has been instituted in Delaware, Florida, Illinois, Massachusetts, Minnesota, Oregon and South Dakota. These systems are compared in THE BRIEF, Nov., 1971, published by the Section of Insurance, Negligence and Compensation Law of the American Bar Association. There is also a comparison of the basic no-fault proposals in TRIAL, Oct./Nov., 1970, at 8-9.

Massachusetts was the first of the fifty states to adopt a no-fault system,⁵ and so, naturally, was the first state to face a judicial test to determine whether a system of no-fault compensation violated any state or applicable federal constitutional provisions. In *Pinnick v. Cleary*,⁶ the Supreme Judicial Court of Massachusetts decided that, at least in the limited form presented by Chapters 231 and 670 of the General Laws of that state, and within the facts presented in the case at hand, no-fault is a reasonable approach to auto-reparations reform.⁷

The Massachusetts Personal Injury Act, which was challenged in this case, proposes generally to pay one entitled to "personal injury protection" benefits⁸ his medical costs⁹ and seventy-five per cent of his wage loss¹⁰ up to a maximum of \$2000.00.¹¹ The insured

5. Puerto Rico enacted a no-fault plan approximately one year before the enactment of the Massachusetts plan; however, it was a national insurance program, and prior to it very few drivers had carried any insurance at all. The province of Saskatchewan in Canada has, since 1946, had a compulsory no-fault payment plan, but it does not affect the right of the injured party to sue in tort. See Rafalowicz, *The Massachusetts No-Fault Automobile Insurance Law: An Analysis and Proposed Revision*, 8 HARV. J. LEGIS. 455 n.1 (1971).

6. ____ Mass. ____, 271 N.E.2d 592 (1971).

7. Since this was the first constitutional test of a no-fault plan, the adversaries spared no effort presenting their arguments. Petitioner's brief alone ran 373 pages and was joined by *amicus* briefs from the American Trial Lawyers Association, the Massachusetts chapter of the American Trial Lawyers Association, and the Massachusetts Bar Association. Respondent was joined by an *amicus* brief co-authored by the American Insurance Association and the American Mutual Insurance Alliance, and by briefs from the Massachusetts Attorney General and the Massachusetts Association of Independent Insurance Agents and Brokers.

8. MASS. GEN. LAWS ch. 90, § 34A (1971), defines those entitled to "personal injury protection" as

the named insured in any such motor vehicle liability policy, the obligor of any motor vehicle liability bond, members of the insured's or obligor's household, any authorized operator or passenger of the insured's or obligor's motor vehicle including a guest occupant, and any pedestrian struck by the insured's or obligor's motor vehicle unless any of the above is a person entitled to workmen's compensation benefits.

9. MASS. GEN. LAWS ch. 90, § 34A (1971), defines recoverable medical expenses as all reasonable expenses incurred within two years from the date of accident for necessary medical, surgical, x-ray, and dental services, including prosthetic devices and necessary ambulance, hospital, professional nursing and funeral services . . .

10. MASS. GEN. LAWS ch. 90, § 34A (1971), also provides:

(P)ayments for loss of wages or salary or their equivalent or, in the case of persons not employed, loss by reason of diminution of earning power, shall be limited to amounts actually lost by reason of the accident and further limited (1) in the case of persons entitled to wages or salary or their equivalent under any program for continuation of said wages or salary or their equivalent to an amount that, together with any payments due under such a program, will provide seventy-five per cent of any such person's average weekly wage or salary or its equivalent for the year immediately preceding the accident, or (2) in the case of persons not entitled to wages or

may sue in all instances for the balance of his medical expenses and wage loss;¹² however, he may maintain a tort action for general damages only if he has incurred medical and hospital costs amounting to at least \$500.00 or the injury sustained causes death, permanent and serious disfigurement, loss of sight or hearing, loss of a body member, or a fracture.¹³

The fact situation in *Pinnick* placed the claimant squarely within the new law and so invited the constitutional test. The accident occurred two days after the bill went into effect, the defendant was clearly liable under traditional tort rules, and plaintiff's injuries were of the soft-tissue variety, with medical expenses of \$115.00 and wage loss of \$650.00. The trial court dutifully dismissed plaintiff's tort suit, and the constitutional test ensued.

Plaintiff initially presented two arguments which would have created a presumption that the statute was unconstitutional. First, he argued that the tort action had the status of a vested property right, and that the statute was unconstitutional in abrogating that right. However, that battle had been fought and lost in numerous decisions dealing with legislative abrogation or modification of a tort action, the courts following the general rule that tort recovery is not a vested property right until the cause of action has accrued.¹⁴ Plaintiff's second contention was that, to the extent that the statute eliminated tort recovery, it impaired a "right to personal security and bodily integrity" which is implicit in the Bill of Rights.¹⁵

salary or their equivalent under any program for continuation of said wages or salary or their equivalent to an amount that will provide seventy-five percent of any such person's average weekly wage or salary or its equivalent for the year immediately preceding the accident.

11. It should be noted that this \$2000.00 maximum applies to medical costs and wage loss combined. Thus, for example, should a claimant's wage loss alone reach the \$2000.00 limit, no recovery for medical expenses could be had on a first-party basis.

12. Whether a suit for the balance of economic loss may include not only amounts above the \$2000.00 limit but also the twenty-five percent not recoverable under first-party coverage is unclear from a reading of the statute itself. An affirmative answer is suggested in Kenney and McCarthy, "No-Fault" in *Massachusetts, Chapter 670, Acts of 1970—A Synopsis and Analysis*, 55 MASS. L.Q. 23 (1970).

13. MASS. GEN. LAWS ch. 231, § 6D (1971).

14. *Silver v. Silver*, 280 U.S. 117 (1929) (guest statute); *New York Cent. R.R. v. White*, 243 U.S. 188 (1917) (workmen's compensation); *Hanfgarn v. Mark*, 274 N.Y. 22, 8 N.E.2d 47 (1937) (breach of promise).

15. This argument was based on the theory that the Bill of Rights was not meant to be exclusive—a theory most clearly proposed as the rationale behind the ninth amendment by Justice Goldberg in his concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479, 492 (1965):

The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments.

Avoiding direct confrontation with the issue of what rights are implied in the ninth amendment,¹⁶ the Massachusetts court refused to accept plaintiff's argument that any such right is denied by the no-fault plan:

Whatever may be the fundamental "right of personal security and bodily integrity" to which the plaintiff refers, it is not affected by c. 670. That chapter merely limits the common law right in the automobile accident situation to obtain money damages on account of unintentionally inflicted pain and suffering and modifies the procedure for obtaining damages according to the common law measure for all other elements of recovery.¹⁷

With these arguments out of the way, the court was able to dispose of the case on general due process and equal protection grounds, the traditional test being whether the statute bears a reasonable relation to a permissible legislative objective.¹⁸ As Chief Justice Tauro pointed out in his concurring opinion, this made the plaintiff's task "virtually insuperable."¹⁹

The legislative objectives listed in the decision were the elimination of court congestion, the high cost of auto insurance in Massachusetts, and the inequities visited upon the plaintiff by the traditional tort system.²⁰ Those opposed to no-fault have often insisted that the fatal defect of this approach lies in the fact that, if anything, these three problems may be significantly worsened by no-fault legislation.²¹ But since it is just as arguable that the plan might significantly operate toward solving these problems, the presumption of constitutionality was confirmed.

In discussing the test of reasonable substitution for prior rights, the court relied on a parallel between the no-fault legislation and workmen's compensation. As in workmen's compensation, while plaintiffs under no-fault do, to some extent, surrender their rights to tort recovery, they gain both reimbursement for out-of-pocket expenses and limited immunity from tort recovery by any other

16. The ninth amendment reads: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

17. ____ Mass. at ____, 271 N.E.2d at 600.

18. The court also applied the test of whether the statute provided a reasonable substitute for pre-existing rights, although it is clear from the decision that the court felt this test was not required. *Id.* at ____, 271 N.E.2d at 607.

19. *Id.* at ____, 271 N.E.2d at 612.

20. *Id.* at ____, 271 N.E.2d at 602-605.

21. See, e.g., Ghiardi and Kircher, *Automobile Insurance: An Analysis of the Massachusetts Plan*, 21 SY. L. REV. 1135 (1970).

person involved in the accident. As such an exchange was found adequate in workmen's compensation,²² so it is adequate here.

Strongly objecting to this analogy, plaintiff insisted that the Workmen's Compensation Act had, in practical effect, *created* a cause of action, since the unholy trio of contributory negligence, assumption of risk and the fellow-servant rule had almost entirely blocked a worker's right to recover in tort for an industrial injury.²³ However, at least theoretically, adoption of no-fault legislation is a significantly less drastic modification of a plaintiff's legal right than was the enactment of workmen's compensation.

The equal protection attacks by the plaintiff were subsidiary, and the court handled them as such. Plaintiff argued that the conditions for allowing tort recovery were arbitrary and unreasonable and that the \$500.00 limit discriminated against the poor. The court answered briefly that any demarcation was bound to work some hardships and inequities, and that plaintiff had not made it apparent that this system of demarcation was so unreasonable as to defeat the statute's constitutionality.²⁴

Pinnick v. Cleary presents some severe problems when one tries to extend the decision beyond the statement that, as the Massachusetts law applies to Mr. Pinnick, a constitutional attack has insufficient merit to require a reversal. At least four factors stand in the way of a broader interpretation of the case. First, there are so many different "no-fault" programs with significant variations that a finding that one plan is constitutional may have no bearing whatsoever on the plan of another state. In fact, the principal similarity among all the plans is the feature of first-party payments, and the objections to that are more philosophical and psychological than constitutional.

22. *New York Cent. R.R. v. White*, 243 U.S. 188 (1917).

23. The American Trial Lawyers Association made an extended argument in anticipation of this parallel. Brief for ATLA as Amicus Curiae at 30-33, *Pinnick v. Cleary*, ____ Mass. ____, 271 N.E.2d 592 (1971).

24. ____ Mass. at ____, 271 N.E.2d at 610. On December 29, 1971, The Chancery Division of the Circuit Court of Cook County, Illinois, in *Grace v. Howlett*, 71 CH 4737, declared the Illinois no-fault plan to be unconstitutional. The Illinois plan differs from that of Massachusetts in that, first, insurance is not compulsory in Illinois, and, second, recovery for pain and suffering is allowed up to an amount equal to one-half of the first \$500.00 of reasonable medical expenses, and 100% of such expenses over \$500.00. The court's main argument was that such a bill arbitrarily discriminated against the poor, both because they are statistically most likely not to be covered by auto insurance, and because their medical expenses are likely to be vastly lower than the medical expenses of people similarly injured who are in higher economic brackets. The Illinois Supreme Court heard the appeal on January 8th, 1972. No decision has been announced as of the time of this writing.

The second factor is the limited nature of the suit involved in *Pinnick*. As Chief Justice Tauro's concurring opinion goes to great lengths to point out, this constitutional test was really one man's attempted tort suit, with no attempt by either side to present any facts other than those which gave rise to this particular suit.²⁵ This means that the issue of constitutionality is not even fully settled in Massachusetts itself. Suppose, for instance, that another individual in Massachusetts were to receive a dislocated shoulder in an auto accident. He is unemployed at the time of the accident, and goes to a free, or at least very inexpensive county hospital. His medical bills do not reach \$500.00, and he is unable to prove that he would have obtained employment had he not been injured. What will the Massachusetts court do with this man's plea that the no-fault plan has unfairly discriminated against him by eliminating his right to recover damages for pain, suffering, and loss of earning capacity simply because of his economic status? One can only speculate as to the answer.

A third factor, somewhat less tangible, is the unique situation of Massachusetts with regard to auto-reparations. Massachusetts was one of the few states to adopt compulsory auto insurance. The insurance rates in Massachusetts are notoriously high, and recovery is limited by all of the traditional commonlaw barriers to tort recovery. This has given a "something must be done" aura to the issue of no-fault in Massachusetts which can be felt in the words of the decision. Perhaps a state with lower rates, more liberal tort recovery laws, and less auto-accident litigation would cast a less lenient glance upon the "rough justice" of such a no-fault plan as that in Massachusetts.

A fourth factor arises when one asks what effect the decision will have on the many no-fault bills now being presented in legislatures across the country. The no-fault issue has rapidly become political, the main result of which is that the decision whether or not to pass such a bill is coming to rest on opinion polls and whether or not a given political figure endorses the bill. It can at least be said that, as the political factor increases in importance, *Pinnick v. Cleary* will decrease in relevance.

MICHAEL H. GILICK

25. By contrast, it is evident from the trial court's opinion in *Grace v. Howlett* that a great deal of evidence was presented of a very broad nature, such as the varying costs of medical expenses in different sections of Chicago. Also, most importantly, the Illinois suit was a taxpayer's action to enjoin expenditure of public funds on the no-fault plan because of its alleged unconstitutionality. Thus the plaintiff was in no way restricted as to the evidence he could adduce on the issue of constitutionality.

